LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
JUN 25 1971
E. ROBERT SEAVER, CLERK

IN THE

Supreme Court of the United States

October Term, 1970

No. ~~1-879~~ 70-333

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNION NO. 189,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent,

and

MECHANICAL CONTRACTORS ASSOCIATION OF CENTRAL OHIO, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

N. VICTOR GOODMAN,
17 South High Street,
Columbus, Ohio 43215,
Counsel for Petitioner.

Of Counsel:
JOHN J. DUFFEY.

MIDWEST LAW PRINTERS AND PUBLISHERS, INC., Columbus, Ohio 43216

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement	3
Reasons For Granting Writ	8
Conclusion	13
Appendix A—Opinion and Order of Sixth Circuit Court of Appeals	15
B—Order of Sixth Circuit Court of Appeals Denying Union Motion for Rehearing and Suggestion of Hearing in Banc	33
C—Order of Sixth Circuit Court of Appeals Denying EEOC Motion for Clarification of Opinion, and Alternative Motion for Rehearing	34
D—Order of District Court Denying Union Motion to Dismiss	35
E—Order of District Court Granting Summary Judgment	40
F—Order of District Court in *Locke* Case, Dated May 29, 1968	62
G—Order of District Court in *Locke* Case, Dated September 30, 1968	64

Page

H—Additional Statutes Involved:
Section 705 (f) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. Section 2000e-4(f)(6) ---- 66

Section 706 (e) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. Section 2000e-5(e) ---- 66

Section 707 (a) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. Section 2000e-6(a) ---- 67

Cases:

American Newspaper Publishing Assn. v. Alexander, 294 F. Supp. 1100 (D. D. C., 1968) ---- 8, 11

EEOC v. Woolco Department Store, 321 F. Supp. 811 (D. La. 1971) ---- 8, 11

Hutchings v. U. S. Industries, 428 F. 2d 303 (5th Cir. 1970) ---- 8, 11

Pettway v. American Cast Iron Pipe Co., 411 F. 2d 998 (5th Cir. 1969) ---- 8, 11

System Federation No. 91 v. Wright, 364 U. S. 642 (1961) ---- 10

Statutes:

Section 705 (f) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. Section 2000e-4 (f) (6) ---- 3

Section 706 (e) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. Section 2000e-5(e) ---- 2, 3, 12

Page

Section 706 (i) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. Section 2000e-5(i) ... 1, 2, 3, 9, 10, 11, 12

Section 707 (a) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. Section 2000e-6 (a) ... 3

Federal Rules of Civil Procedure

Rule 12 (b) (1) ... 5

Rule 12 (b) (6) ... 5

Rule 56 ... 5

Other Authority:

92'd Congress, 1st Session, H. R. 1746 ... 11

92'd Congress, 1st Session, H. R. 6760 ... 11

84 Harvard Law Review, *Developments—Title VII*, 1109 (1971) ... 8, 9, 12

U. S. Equal Employment Opportunity Commission, *Legislative History of Title VII and Title XI of Civil Rights Act of 1964* ... 8, 9, 11

Vass, *Title VII—Legislative History*, 7 B. C. Ind. and Com L. Rev. 431 (1966) ... 8

IN THE

Supreme Court of the United States

October Term, 1970

No. ____

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNION NO. 189,

Petitioner,

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Respondent,

and

MECHANICAL CONTRACTORS ASSOCIATION OF CENTRAL OHIO, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 189, petitions for a Writ of Certiorari to review the judgment of The United States Court of Appeals for the Sixth Circuit in this case insofar as it held that these proceedings were within the authority granted to The Equal Employment Opportunity Commission by Section 706 (i)

of Title VII of the Civil Rights Act of 1964, 42 U. S. C. Section 2000e-5 (i).

OPINIONS BELOW

The opinion and order of the Court of Appeals (Appendix A, *infra*) is reported at 438 F. 2d 408. The opinion and order of the United States District Court for the Southern District of Ohio, Eastern Division (Appendix E, *infra*) is reported at 311 F. Supp. 468.

JURISDICTION

The Judgment of the Court of Appeals was entered on February 3, 1971. The Union's timely petition for re-hearing and suggestion for re-hearing *en banc* was denied on March 30, 1971 (Appendix B, *infra*). The Commission's motion for clarification of opinion and alternative motion for re-hearing were also denied on March 30, 1971 (Appendix C, *infra*). The jurisdiction of this Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED

Congress denied to the Equal Employment Opportunity Commission any general powers to seek judicial enforcement of alleged violations of Title VII of the Civil Rights Act of 1964. The only such authority granted the agency is that found in Section 706 (i) of the Act. The Section provides that where a private person has previously obtained an order in a private suit under Section 706 (e) of the Act, EEOC "may commence proceedings to compel compliance with such order."

Are proceedings by EEOC "to compel compliance" under Section 706 (i) of the Act limited to contempt proceedings based on charges of violation of previous

judgment orders as entered, or may EEOC seek to modify a judgment order granted in a previous private suit?

Assuming that Section 706 (i) does not grant EEOC authority to seek modification, does EEOC have authority to instigate the exercise of the District Court's power to modify judgments *sua sponte*, and then undertake active litigation seeking modification, using Commission staff and attorneys?

STATUTES INVOLVED

The statute involved is Section 706 (i) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. Section 2000e-5 (i). It provides, in full, as follows:

> "(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under subsection (e) of this section, the Commission may commence proceedings to compel compliance with such order."

Directly bearing on Section 706 (i), are: Sections 705 (f) of Title VII, 42 U. S. C. Section 2000e-4 (f) (6); Section 706 (e) of Title VII, 42 U. S. C. Section 2000e-5 (e); and Section 707 (a) of Title VII, 42 U. S. C. Section 2000e-6 (a). These are set forth in Appendix H.

STATEMENT

A. The Original Civil Action Brought Pursuant to Section 706 (e) of Title VII by Gwylard Locke.

On May 18, 1968, Gwylard Locke filed an action allegedly pursuant to Section 706 (e) of Title VII of the Civil Rights Act of 1964, 42 U. S. C. Section 2000e-5 (e) (J.A.

pp. 54-69).[1] The defendants were the petitioner herein (Union), and the respondent Mechanical Contractors Association (Contractors). The action was assigned District Court Civil Action No. 68-148. Mr. Locke charged that the then hiring hall job referral system established under the Collective Bargaining Agreement between the Union and the Contractors was discriminatory against Negroes. On May 29, 1968, before an answer, and without trial, the District Court accepted a settlement agreement. The Court granted an order providing for (1) affirmative action to assure Mr. Locke equal employment opportunity, (2) renegotiation of the Collective Bargaining Agreement for the sole purpose of assuring compliance with Title VII and submission of the renegotiated provisions to the Court for approval, and (3) an award of Ten Thousand Dollars ($10,000.00) to Mr. Locke, (App. F. *infra;* J.A. pp. 70-71).

Thereafter, the Contractors and the Union did mutually agree on revisions. The revised hiring hall system was submitted to the Court. On September 30, 1968, the Court filed its "Memorandum of Approval" (App. G. *infra;* J.A. pp. 72-73). This recites that the matter is before the Court pursuant to its order of May 29, 1968, relative to the renegotiation of the hiring hall system, and that upon consideration the Court "approved" the revised system "as appearing to be in compliance with Title VII of the Civil Rights Act of 1964."

B. The Present Proceedings Brought By EEOC Pursuant to Section 706 (i) "To Compel Compliance With" The Locke Case Order.

The present proceeding is District Court Civil Action No. 69-160. This proceeding was commenced by EEOC

---

1. "J.A." references are to the joint appendix filed in the court below, a copy of which has been filed with the clerk.

upon a "Petition To Show Cause and for Other Relief." (J.A. pp. 3-11 and 12-81.) The Petition alleges that it is brought pursuant to Section 706 (i) of Title VII, 42 U.S.C. Section 2000e-5 (i). The Union and the Contractors were named as the Respondents.

The Petition requests (1) the District Court hold the Union "in contempt" of the order of the Court dated May 29, 1968, on the basis of alleged discriminatory practices arising after September 30, 1968; (2) the Court "amend its Memorandum of Approval of September 30, 1968"; and (3) the Court "substitute therefore" i.e., for the Memorandum of Approval, an order requiring the Union "to take certain steps to comply with Title VII." The Petition was accompanied by a 70-page Appendix containing copies of various documents and a number of affidavits.

The Union filed a Motion to Dismiss pursuant to Rule 12 (b) (1) and (6) of the Federal Rules of Civil Procedure (J.A. p. 85). This Motion was denied (App. D; J.A. p. 86). Thereafter, the Union filed its "Answer" in the normal form.

EEOC filed a motion for partial summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure (J.A. p. 195). The motion raises no question of contempt of court and is not concerned with any alleged practices arising after September 30, 1968.

The motion is limited "to that portion of the petition filed in this action alleging that respondents have violated the provisions of this Court's order of May 29, 1968, with respect to the hiring hall provisions of their Collective Bargaining Agreement." That is the portion of the petition which seeks to "amend" the 1968 Memorandum of Approval and to "substitute" another order revising the hiring hall.

The sole issue presented by EEOC was whether the re-negotiated system approved by the Memorandum

Order of September 30, 1968, did or did not comply with Title VII.

On April 14, 1970, the District Court granted a Summary Judgment. The Opinion states that Summary Judgment was sought "on the issue of whether the Union has violated the provisions of Title VII of the Civil Rights Act of 1964." (App. E; J.A. p. 501) The Court also referred to the order of May 29, 1968. The Court found that the Union had engaged in racial discrimination *prior* to 1968, that the hiring hall system perpetuated the effect of that discrimination, and that the system should be changed. The Judgment requires the Union and the Contractors to again re-negotiate the hiring hall system in the Collective Bargaining Agreement and to eliminate certain seniority rights, test requirements and job experience qualifications. The Union appealed.

C. The Decision of the Court of Appeals.

The appeal from the Summary Judgment involved three issues: (1) The statutory authority of EEOC to sue; (2) the propriety of summary judgment on the fact issues of discrimination and job qualifications; and (3) The District Court's suppression of certain evidence.

The Court of Appeals reversed the Judgment and remanded for hearing. The Court found genuine issues of fact existing. As to suppression of evidence, the Court found initially that it was unnecessary to pass on the matter, but subsequently appears to have found suppression was an error (See order on re-hearing, App. B).

On the issue of statutory authority to sue granted by Section 706 (i), the majority of the Court first found that the present proceedings were properly to be considered as part of the original *Locke* case, and that it was improper to have numbered and processed the matter

as a new case, and took into consideration the entire record in *Locke* in addition to the EEOC proceedings.

The majority then recognized that Congress "did intend to withhold from EEOC the power to bring a complaint," and that initiation of complaints by the government and the power to intervene in private suits was reserved to the United States Attorney General. However, the Court found that Section 706 (i) provided EEOC with "an important enforcement role." Noting that the District Court had reserved jurisdiction to enforce its order, the majority characterized the District Court action as a "supplementary order," and stated:

> "We have no doubt that 42 U.S.C. 2000e-5(i) conveyed ample authority to EEOC to call to the attention of the court any deficiencies in the effectiveness of the compliance proceedings. And beyond question, the District Court had authority either sua sponte or on petition to reshape its injunction so as to achieve its original and wholly appropriate purpose. *United States v. United Shoe Machinery Corp.*, 391 U.S. 244 (1968); *King-Seeley Thermos Co. v. Aladdin Industries, Inc.*, 418 F. 2d 31 (2d Cir. 1969).
>
> We now hold that this is an appropriate proceeding 'to compel compliance' with the District Court order in the *Locke* case (42 U.S.C. §2000e-5(i)) and that the District Court had both jurisdiction and power to enter the supplementary order here appealed from."

Judge Paul Weick concurred in the reversal but dissented from the remand on the ground that the petition should be dismissed. On the issue of authority to sue, Judge Weick stated:

> "The majority treats the petition of EEOC for an order to show cause as a compliance proceeding in the *Locke* case. The trouble with this treatment is that EEOC in said petition sought, not to enforce,

but to amend and modify the order entered in the *Locke* case which approved the renegotiated agreement, and to substitute in the place thereof a new order. If such petition is treated as having been filed in the *Locke* case, which it was not, then such filing would at least constitute an intervention in that case. In my opinion EEOC had neither the authority to file an independent action to enforce compliance with the Act, nor authority to intervene in the *Locke* case. The power to file an independent action to enforce compliance with the Act or to intervene in an action instituted by the aggrieved party was vested by Congress solely in the Attorney General. 42 U.S.C. §2000e-6(a); 42 U.S.C. §2000e-4(f)."

REASONS FOR GRANTING THE WRIT

The lower courts in this proceeding, the cases to date, and all commentators have recognized that Congress intended to, and did, deny to EEOC any power or authority to seek judicial enforcement of Title VII. *Pettway v. American Cast Iron Pipe Co.*, 411 F. 2d 998 (5th Cir. 1969); *Hutchings v. U.S. Industries*, 428 F. 2d 303 (5th Cir. 1970); *American Newspaper Publishing Ass'n v. Alexander*, 294 F. Supp. 1100 (D.D.C. 1968); *EEOC v. Woolco Department Store*, 321 F. Supp. 811 (D. La. 1971); Vass, *Title VII: Legislative History*, 7 B.C. Ind. & Com. L. Rev. 431 (1966); 84 Harvard Law Rev. *Developments—Title VII*, 1109, at p. 1228 et seq.

As originally passed by the House, Title VII granted EEOC authority to originate suits to enforce the Act—in fact, the Commission was to have an affirmative obligation to file court actions. See H.R. 7152, Section 707 and comment of Hon. G. Meader in *Legislative History of Title VII and XI of Civil Rights Act of 1964*, U.S. Equal Employment Opportunity Commission.[2] The historic Mansfield-Dirksen compromise on enforcement powers enabled the ultimate passage of the Civil Rights Act of

2. This volume hereafter cited as "Legislative History."

1964 in the Senate. That compromise was the denial of any administrative or judicial enforcement role to EEOC and the substitution of the Attorney General to the exclusion of the Commission. *Legislative History* (comparative analysis of House and Senate Bills by Senator Dirksen) at p. 3023 et seq.

Senator Humphrey stated the legislative intent as follows:

> "The role of the Federal Government in obtaining enforcement of the title through litigation is preserved, but not through the Commission. . . ."
>
> *Legislative History*, p. 3003-4

See also remarks of Senator Holland, *Legislative History*, pp. 3061-2; the analysis of Senator Clark (one of the Floor leaders for the House version), *Legislative History*, pp. 3066-67; Vass, *Title VII—Legislative History*, supra at 452, (1966).

1. The Decision of the Sixth Circuit Goes Directly to Title VII Enforcement Procedures and the Function of EEOC In the Determination of Policy.

Present proceedings were brought by EEOC to obtain a judicial sanction for a device which will provide EEOC with a substantial role in enforcement. The device involves the use of a broad consent decree in a private suit, coupled with EEOC proceedings under Section 706 (i) of the Act. See 84 Harvard Law Rev., *Developments—Title VII* at p. 1236 and at p. 1248-1249, n. 300.

Section 706 (i) of the Act, as interpreted by the Union, will permit EEOC to bring only traditional contempt proceedings for violation of specific injunctive provisions and other ancillary enforcement procedures and would require at least the presence, or consent of the original parties plaintiff. This was apparently the view

of Senator Dirksen. He explained Section 706 (i) as follows:

> "New subsection (i) provides that the Commission may commence proceedings for contempt where there has been a violation of an order issued by the court in a civil action brought by an aggrieved party."
>
> *Legislative History*, p. 3019

As interpreted by EEOC, Section 706 (i) permits EEOC: (a) to bring on independent action—if not by file number, still in the sense that there is no need for consent, joinder or even apparent participation by the original parties plaintiff; and (b) to seek modification and substitution of the previous orders in the private action to which EEOC was not a party, and (c) to be entitled to modification on the basis of error of law without reliance upon any change in circumstances. Compare *System Federation No. 91 v. Wright*, 364 U.S. 642 (1961). The Supreme Court should also note that the Attorney General, although possessing the right, did not choose to intervene in the *Locke* case, and has neither intervened nor participated in any way in the present EEOC proceedings.

The device sanctioned by the majority opinion in the Sixth Circuit goes to the heart of Title VII enforcement procedures. The legislative price for passage of the Act was removal of EEOC's litigation function, and placement of that power in the more politically responsive Department of Justice. Lower courts here have provided EEOC with a means to compete with, and even contest, Justice Department enforcement policy. They have enabled that which Congress intended to deny.

Accordingly, Petitioner respectfully suggests that this appeal involves major issues concerning the responsibility for Title VII enforcement policy and administration.

2. The Lower Courts' Decisions are Implicitly in Conflict With The Decisions of the Fifth Circuit.

In *Pettway v. American Cast Iron Pipe Co.*, 411 F. 2d 998 (5th Cir. 1969), the Court recognized the legislative history of Title VII enforcement. The Court explicitly reviewed, and implicitly limited, EEOC to administrative functions of investigation and conciliation. The Fifth Circuit's view is further apparent in its opinion in *Hutchings v. U.S. Industries, Inc.*, 428 F. 2d 303 (5th Cir., 1970). The same view is reflected in *American Newspaper Publishers Ass'n v. Alexander*, 294 F. Supp. 1100 (D.D.C. 1968); *EEOC v. Woolco Department Store*, 321 F. Supp. 811 (D. La. 1971).

The Sixth Circuit expresses the view that Section 706 (i) gave EEOC "an important enforcement role." The Court found that such a proceedings was an appropriate means to enter a "supplementary" order to the original judgment, and to "reshape" the injunction.

The conflict in these views is the same that led to the Senate debates and the Mansfield-Dirksen compromise. It has been a continuous subject of Congressional debate and legislative proposal. At present, two bills are receiving significant attention in the House. H.R. 1746 and H.R. 6760.

This Court should resolve the judicial conflict created by the Sixth Circuit decision.

3. The Lower Courts Failed to Distinguish the Standing of a Person From the Question of Statutory Authority and Ultra Vires Action by a Governmental Agency and its Employees.

In addition to Section 706 (i) of the Act, the Court of Appeals relied in the alternative upon the authority of a District Court, *sua sponte*, to modify its own decree.

Attorneys, acting for themselves, may accept appointment by a District Court to assist the court in the ex-

ercise of its judicial powers. However, EEOC is a governmental agency, and both it and its employees' actions must be grounded in statutory authority. While the District Court may invoke power granted to it under the Judicial Code, EEOC must have statutory authority to accept and act under that power. EEOC's power to act depends upon Title VII and not upon the Judicial Code.

This has been a contested, adversary proceeding, consuming hundreds of hours of EEOC staff effort and thousands of dollars of the agency's budget. No party plaintiff has participated. The Attorney General has never intervened. The District Judge has never suggested that he even wished EEOC to press this litigation. The actions undertaken are clearly those of EEOC acting on its own behalf under power claimed to rest on Section 706 (i) of Title VII.

However, even assuming that the source of authority for these proceedings stems not from Title VII but from the Court's judicial powers, that assumption does not obviate the question of whether EEOC's actions are ultra vires.

(EEOC has appeared frequently as amicus curiae in private suits brought under Section 706 (e) of Title VII. To date, EEOC has not appeared as amicus curiae to oppose the position of the Attorney General in any action to which he has been a party. It has sought and been granted the right to intervene—in the face of the provisions of Section 706 (e) of the Act relating to intervention by the Attorney General. 84 Harvard Law Rev., *Developments—Title VII*, p. 1239 and n. 253.)

In view of the legislative history of Title VII, Petitioner respectfully contends that judicial permission to EEOC to participate in litigation must be distinguished from permission given to agencies to which Congress has

granted general responsibility for litigation. In the context of Title VII, such judicial permissiveness constitutes an invasion of Congressional powers, and a judicial disrespect for the Congressional denial of such powers to an agency created by Congress.

CONCLUSION

For the reasons set forth, it is respectfully submitted that this petition for a writ of certiorari should be granted.

N. VICTOR GOODMAN
Attorney for Petitioner
17 South High Street,
Columbus, Ohio 43215 (221-2341)

Of Counsel:
JOHN J. DUFFEY

PROOF OF SERVICE

I, N. Victor Goodman, one of the Attorneys for the Petitioner United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 189, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 24 day of June, 1971, I served copies of the foregoing Petition for a Writ of Certiorari to the Supreme Court of the United States on the several parties thereto and upon the Solicitor General, Department of Justice, pursuant to Rule 33 (2) (a) United States Supreme Court Rules, as follows:

(1) On the Solicitor General, by mailing a ~~copy~~ thereof in a duly addressed envelope, with air-mail postage prepaid, to the Solicitor General, Department of Justice, Washington, D. C. 20530.

(2) On the Equal Employment Opportunity Commission, by mailing a copy thereof, in a duly addressed envelope, with air-mail postage pre-paid to: 1800 G Street, N. W., Washington, D. C. 20206.

(3) On Mechanical Contractors Association of Central Ohio, by mailing a copy in a duly addressed envelope with first class postage prepaid to Stuart M. Gordon, 37 West Broad Street, Columbus, Ohio 43215.

N. VICTOR GOODMAN

APPENDIX A

OPINION AND ORDER OF SIXTH CIRCUIT COURT OF APPEALS

No. 20514

United States Court of Appeals
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner-Appellee,

v.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNION No. 189,

Respondent-Appellant,

and

MECHANICAL CONTRACTORS ASSOCIATION OF CENTRAL OHIO, INC.,

Respondent-Appellee.

Appeal from the United States District Court for the Southern District of Ohio, Eastern Division.

Decided and Filed February 3, 1971.

Before: PHILLIPS, Chief Judge, WEICK and EDWARDS, Circuit Judges.

EDWARDS, Circuit Judge. This is an appeal from a summary judgment entered by a District Judge in the United States District Court for the Southern District of Ohio, Eastern Division, on petition of the Equal Em-

ployment Opportunity Commission. The judgment requires respondent, Plumber's Union,[1] to renegotiate its collective bargaining agreement and substantially to alter its seniority groups by eliminating the current work experience requirements and the Journeymen's examination requirement. The District Judge found, as EEOC contended he must (from what EEOC claimed and the District Judge found to be undisputed facts), that the union agreement, although nondiscriminatory on its face, operated against a past background of exclusion of all Negroes from the plumbing trade so as to constitute present and future discrimination, in violation of the Civil Rights Act of 1964, 42 U.S.C. §2000(e) et seq. (1964).

Although the parties do not frame them that way, it appears to this court that at least three important issues are presented on this appeal. The first is whether this case, which was numbered and processed as an entirely new case in the District Court, should have been and should now be treated as the same case as a preceding and closely related case entitled *Locke v. Local 189, et al.*, Civil No. 68-148 (S.D. Ohio 1968). In *Locke* by a "settlement agreement" the parties proposed and the court entered a final judgment upon which in the present appeal both EEOC and the District Judge relied.

The second issue is whether in either event plaintiff EEOC had standing to bring this suit under 42 U.S.C. §2000(e)-5(i) which reads as follows:

> "(i) In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action

---

1. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 189.

> brought under subsection (c) of this section, the Commission may commence proceedings to compel compliance with such order."

The third question is, no matter how the procedural questions stated above may be answered, did the District Judge have undisputed facts before him from which he could properly have entered the findings of fact upon which his summary judgment depends, including two (findings 11 and 12) which appellant now claims are in dispute and always have been.

Over and above these issues, appellant union contends the District Judge committed reversible error by admitting and considering certain depositions and refusing to admit and consider certain others.

The factual posture of this case is somewhat complex and is relevant to both the procedural and substantive questions involved here. We recite it from the opinion of the District Judge:

> "This matter is before the Court on the motion of the petitioner, the Equal Employment Opportunity Commission (hereinafter 'Commission'), for a summary judgment under the provisions of Rule 56 of the Federal Rules of Civil Procedure. This motion is sought against the respondent, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 189 (hereinafter 'Union'), on the issue of whether the Union has violated the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. §2000c-2 (hereinafter Title VII) with respect to the hiring hall and referral provisions of their collective bargaining agreement with the other named defendant, the Mechanical Contractors Association of Central Ohio, Inc. (hereinafter 'Association').
>
> * * *

"The order which the Commission claims has been violated was issued by this Court on May 29, 1968, in the case of Locke v. Local Union No. 189, et al., Civil No. 68-148 (S.D.E.D. Ohio, 1968). The *Locke* case was a private action under Title VII (42 U.S.C.A. §2000e et seq.) to redress and enjoin unlawful employment practices, specifically discrimination on the basis of race, on the part of the named defendants.

"On May 29, 1968, on the basis of the Settlement Agreement entered into among the parties, the Court ordered in part that:

> 3. Articles XV and XVI of the [Collective Bargaining] Agreement [relating to hiring hall and referral procedures and seniority and layoff provisions] between Local Union No. 189 and the Mechanical Contractors Association of Central Ohio, Inc., effective June 1, 1967, shall be renegotiated between the parties to the Collective Bargaining Agreement for the sole purpose of assuring compliance with Title VII of the Civil Rights Act of 1964, and submitted to the Court for approval.

"Subsequently, on September 30, 1968, a Memorandum of Approval was submitted to the Court, and then signed by this district judge, which stated in part:

> Upon consideration thereof, the Court approves such renegotiated Articles XV and XVI, a copy of which is attached to this Memorandum and made a part hereof, as *appearing* to be in compliance with Title VII of the Civil Rights Act of 1964. (Emphasis added.)

"The renegotiated Articles XV and XVI are attached to this Opinion and Order as Appendix A.

"The Commission contends in the present proceeding that these renegotiated provisions of the Collective Bargaining Agreement are not, in fact,

in compliance with Title VII and that the Union should be required to alter certain provisions of these articles to comply fully with the May 29, 1968 Order in the *Locke* case.

"The respondent correctly points out that the remedy of summary judgment is only appropriate when there is no dispute as to material facts related to the issue presented by the motion. It is also true that when there are inferences sought to be drawn from undisputed facts, they are to be viewed in a light most favorable to the party against whom the summary judgment is sought. Williamson v. Wilbur-Rogers, Inc., 381 F.2d 719 (6th Cir. 1967).

"The Union has asserted repeatedly that it does dispute some of the facts upon which the Commission must rely in order to set forth a meritorious motion for summary judgment. However, nowhere in the record of this case does it appear that the following facts are genuinely disputed, and the Court finds that they are not, in fact, nor could they reasonably be, disputed.

"1. The provisions of the present collective bargaining agreement establish a system of priorities of available work, priority being given to the persons in Group I.
"2. The Union's present referral list contains about 1100 names.
"3. There are 800 journeymen in Group I, all of whom are white.
"4. There is not one Negro journeyman working within the Union's jurisdiction eligible for placement in Group I.
"5. There are no Negro journeymen who will become eligible for assignment to Group I in the foreseeable future.
"6. There are no Negroes [with the possible exception of Frank Williams] assigned to Group II to which about 300 white journeymen are assigned.

"7. Prior to September, 1968, the Union had never referred a Negro.

"8. The Union only recently admitted its first Negro apprentices.

"9. The Union has never had a Negro member [with the possible exception of Frank Williams].

"10. There are at least nine Negroes within the jurisdiction of the Union who possess City of Columbus plumbing licenses.

"11. There are presently and there have been Negroes within the Union's jurisdiction who can perform plumber's work.

"12. There are presently Negroes in the Union's jurisdiction who are capable of safely and efficiently performing journeyman work, but who do not meet the requirements set forth in the collective bargaining agreement for placement in Groups I or II.

"13. The 1960 Census of Population of the three counties (Franklin, Delaware and Pickaway) which comprise the metropolitan Columbus, Ohio area showed a total population of 754,885 persons. Of this total, the Census listed 81,917 as being members of the Negro race.

"With these facts before the Court as undisputed, the essential question presented for judicial determination at this time is whether or not these facts are sufficient to support a summary judgment in the petitioner's favor. Stated otherwise, do the undisputed facts justify a finding by this Court that the hiring hall and referral provisions of the collective bargaining agreement operate in a discriminatory manner and thus are in violation of Title VII of the Act?" (Footnote omitted.)

The District Judge answered his own last question in the affirmative. He entered an order granting relief as

requested by the EEOC requiring respondent union to renegotiate its contract with the Contractors' Association so as to eliminate from Articles XV and XVI thereof the requirement that persons in the class represented by the original plaintiff Locke must have five years work experience in the trade under the collective bargaining agreement and pass a journeymen's examination before being placed in the preferred referral classes for employment.

The fundamental thrust of appellant's argument is procedural. The union claims that Congress denied EEOC power to initiate actions to enforce the Civil Rights Act of 1964; that EEOC's filing of this action was ultra vires; and that the District Judge should have dismissed the complaint and that we must now do so.

We agree with appellant in part. We have no doubt that Congress did intend to withhold from EEOC the power to bring a complaint of violation of the Civil Rights Act. The history of the legislative compromise shows that the initiation of complaints under the Act was reserved to the United States Attorney General and to private litigants. *See generally* U.S. Equal Employment Opportunity Comm'n, *Legislative History of Titles VII and XI of the Civil Rights act of 1964*, 3023 et seq. (comparative analysis of the Senate and House Bills, prepared by Sen. Dirksen), 3003-05 (comments of Sen. Humphrey), 3066-67 (analysis of Floor Leader Sen. Clark) (1964). The same conclusion may be drawn from a reading of the relevant portions of the Act, 42 U.S.C. §§2000e-4(f)(6), -5(a) et seq. (1964). *See also* VASS, *Title VII: Legislative History*, 7 B.C. IND. & COM. L. REV. 431 (1966).

But the Act by providing for private civil actions (*see* 42 US.C. 2000e-5(e)) also allows the initiation of such

suits as class actions under Rule 23 of the Federal Rules of Civil Procedure when, as here, the conditions set forth in the rule are met. *Miller v. International Paper Co.*, 408 F.2d 283 (5th Cir. 1969); *Oatis v. Crown Zellerbach Corp.*, 398 F.2d 496 (5th Cir. 1968).

The Act also provided for EEOC to have an important enforcement role. When an organization failed to comply with an order of a court, the Act provides that EEOC can "commence proceedings to compel compliance with such order." 48 U.S.C. §2000e-5(i) (1964).

This then requires us preliminarily to determine whether the instant action is a new complaint or "a proceeding to compel compliance" with a previously existing court order.

Examination of the District Court files in *Gwylard Locke v. Local 189, et al.*, Civil No. 68-148 (S.D. Ohio 1968), and *EEOC v. Local 189, et al.*, Civil No. 69-160 (S.D. Ohio 1970), convinces us that beyond question this is a "proceeding" in the *Locke* case "to compel compliance" with the order of the District Court entered in *Locke*.

The original *Locke* complaint was a class action. Paragraph 6 of the complaint recited:

> "Plaintiff brings this action on his own behalf and on behalf of other Negroes in Central Ohio, who desire employment within the work jurisdiction of defendant, Local Union No. 189, but who are prevented from working in the building trades industry by the unlawful acts of defendants herein set forth. There are common questions of law and fact affecting the rights of Negroes in the aforesaid group and class who are and have been limited, classified, and discriminated against in ways which deprived and tend to deprive them of employment opportunities and otherwise affect their status as employees be-

cause of their race and color. These persons are so numerous as to make it impracticable to bring them all before this Court. However, a common relief is sought and this plaintiff is an adequate representative of the said class."

The settlement of the *Locke* case was a class action settlement:

"SETTLEMENT AGREEMENT TO FORM BASIS OF COURT ORDER

"In order to settle the within dispute, the parties, through their counsel, agree as follows:

"1. All parties do hereby agree to be bound to an order in which this agreement shall be incorporated upon its acceptance by the Court.

"2. The Union, through its agents, will not maintain any policy, practice, custom or usage, including striking, work stoppage or work slowdown, to deny, abridge, withhold, condition, direct or otherwise interfere with the right of Gwylard W. Locke in particular, and Negroes in general, to equal employment opportunity, as that term is used in Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e, *et seq.*, and agree to take affirmative action forthwith to assure Gwylard W. Locke equal employment opportunity.

"3. Articles XV and XVI of the Agreement between Local Union No. 189 and Mechanical Contractors Association of Central Ohio, Inc., effective June 1, 1967, shall be re-negotiated between the parties to the Collective Bargaining Agreement for the sole purpose of assuring compliance with Title VII of the Civil Rights Act of 1964, and submitted to the Court for approval.

"4. Local Union No. 189 shall forthwith pay Gwylard W. Locke $10,000, which shall represent payment in full of back pay and attorney fees and any other monetary claims asserted in the Amended Complaint.

"5. The Court shall retain continuing jurisdiction to enforce its Order."

The District Court order ran to the benefit not of Locke alone, but to the benefit also of the class:

"1. Plaintiff, and the class whom he represents, is hereby granted a permanent injunction enjoining defendant, Local Union No. 189, its agents, successors, trustees, officers, employees, attorneys, and those acting in concert with them and at their direction or request from continuing or maintaining any policy, practice, custom or usage, including strikes, work stoppages or work slowdowns, of denying, abridging, withholding, conditioning, directing, or otherwise interfering with the right of plaintiff and others similarly situated to enjoy equal employment opportunity as secured by Title VII of the Civil Rights Act of 1964, 42 U. S. C. Section 2000e.

* * *

"3. Articles XV and XVI of the Agreement between Local Union No. 189 and the Mechanical Contractors Association of Central Ohio, Inc., effective June 1, 1967, shall be re-negotiated between the parties to the Collective Bargaining Agreement for the sole purpose of assuring compliance wtih Title VII of the Civil Rights Act of 1964, and submitted to the Court for approval.

* * *

"The Court shall retain continuing jurisdiction to enforce this Order."

The EEOC petition was filed "to compel compliance" with the *Locke* order:

"The Equal Employment Opportunity Commission (hereinafter the 'Commission'), pursuant to Section 706 (i) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5(i), respectfully petitions this Court to issue an Order holding Respondents in contempt of the Order of this Court dated May 29,

1968, and to amend its Memorandum of Approval of September 30, 1968, entered in the case of *Gwylard W. Locke v. United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States, Local 189, et al.*, Civil Action No. 68-148; and to substitute therefor an Order requiring the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local No. 189 (hereinafter 'Local 189') and the Mechanical Contractors Association of Central Ohio (hereinafter 'MCACO') to take certain specific steps to comply with Title VII."

This court is not bound by the way the Clerk of the District Court chose to docket, style or file this action. We look through form to substance. Disposition of the merits of the case is not precluded by a procedural mistake in the office of the Clerk of the District Court. As heretofore pointed out, the authority of EEOC is limited by the statute, 42 U.S.C. § 2000e-5(i). However, the Congress, by express language, has conferred on EEOC the power to institute proceedings to compel obedience with judicial orders. We hold that the action in the present case was initiated in the exercise of this power. We regard this case as a compliance proceeding in the *Locke* case and we so treat it for the purposes of this appeal.

This brings us to the closely related question as to whether, as claimed by appellant, there had been complete and final compliance with the court order in *Locke* so as to foreclose any further proceedings in that case. We do not think the record supports this contention.

It is clear to us that the purpose of the judgment entered in the *Locke* case was to bring relief not only to Locke, but also to a class of persons similarly situated who had likewise previously been discriminated against

in employment terms in violation of Title VII of the Civil Rights Act of 1964. Very properly the court expressly reserved jurisdiction to enforce its order. *See United States* v. *International Brotherhood of Electrical Workers, Local 38*, 428 F.2d 144 (6th Cir. 1970).

The order of the District Judge subsequent to renegotiation of Articles XV and XVI did not terminate court jurisdiction over enforcement proceedings and the term *"as appearing to be in compliance with the terms of Title VII"* we read as only tentative approval of appellant's compliance actions.

We have no doubt that 42 U.S.C. 2000e-5(i) conveyed ample authority to EEOC to call to the attention of the court *any deficiencies in the effectiveness of the compliance proceedings.* And beyond question, the District Court had authority either sua ponte or on petition to reshape its injunction so as to achieve its original and wholly appropriate purpose. *United States* v. *United Shoe Machinery Corp.*, 391 U.S. 244 (1968); *King-Seeley Thermos Co.* v. *Aladdin Industries, Inc.*, 418 F.2d 31 (2d Cir. 1969).

We now hold that this is an appropriate proceeding "to compel compliance" with the District Court order in the *Locke* case (42 U.S.C. § 2000e-5(i)) and that the District Court had both jurisdiction and power to enter the supplementary order here appealed from.

This, then, brings us to the union's claim that in any event these proceedings were inappropriate for summary judgment because of disputes of material fact which required testimonial hearing before appropriate relief measures could be determined.

As we have noted, appellant's claims in this regard relate only to the two following findings of fact of the District Judge:

"11. There are presently and there have been Negroes within the Union's jurisdiction who can perform plumber's work.

"12. There are presently Negroes in the Union's jurisdiction who are capable of safely and efficiently performing journeyman work, but who do not meet the requirements set forth in the collective bargaining agreement for placement in Groups I or II."

The majority of our panel feels that there were disputed facts and inferences which had to be resolved before these two findings could be entered. In such a situation summary judgment is inappropriate. *S. J. Groves & Sons Co.* v. *Ohio Turnpike Comm'n*, 315 F.2d 235 (6th Cir.), *cert. denied*, 375 U.S. 824 (1963).

Since on remand a testimonial hearing will be required we find no need to answer the appellate questions concerning the District Judge's exclusion of certain statements and consideration of others during the summary judgment proceeding.

The judgment of the District Court is vacated and the case is remanded for hearing in accordance with this opinion.

WEICK, Circuit Judge, concurring in part and dissenting in part. I agree that the District Court erred in granting summary judgment. Material facts, as well as the inferences to be drawn therefrom, were in dispute. In such a situation the granting of summary judgment was unauthorized. Rule 56 Fed.R.Civ.P.; *S. J. Groves & Sons Co.* v. *Ohio Turnpike Comm'n*, 315 F2d 235 (6th Cir. 1963), *cert. denied*, 375 U.S. 824 (1963).

Title VII of the Civil Rights Act of 1964 withheld power from EEOC to institute action to compel compliance with the Act or even to intervene in an action brought by an aggrieved party. The only power to in-

stitute such an action or to intervene in an action by an aggrieved party was vested by Congress in the Attorney General. 42 U.S.C. § 2000e-6(a); 42 U.S.C. § 2000e-4(f).

EEOC was authorized only to institute proceedings to compel compliance *with judicial orders*. 42 U.S.C. § 2000e-5(i) provides:

> "In any case in which an employer, employment agency, or labor organization fails to comply with an order issued in a civil action brought under subsection (e) of this section, the Commission may commence proceedings to compel compliance with such order."

The legislative history of Title VII reveals that as originally passed by the House of Representatives, the bill not only authorized but obligated EEOC to institute actions to enforce the Act. These enforcement provisions were stricken by compromises worked out in the Senate by Senators Mansfield, Dirksen and Humphrey which effected a "transfer of litigating responsibilities from the Commission to the Attorney General." Legislative History of Titles VII and XI of Civil Rights Act of 1964, U.S. Equal Employment Opportunity Commission, pp. 2057, 3005. H.R. 7152 § 707.

In *Pettway* v. *American Cast Iron Pipe Co.*, 411 F.2d 998, 1005 (5th Cir. 1969), the Court said:

> "Unlike so many Governmental structures in administrative law, EEOC is an administrative agency without power of enforcement. While it can subpoena witnesses, hold hearings, and attempt conciliation, it has no authority to issue orders or compel enforcement."

In *American Newspaper Publishers Ass'n* v. *Alexander*, 294 F.Supp. 1100 (D.D.C. 1968), it was held that EEOC does not have enforcement powers.

It is not the function of the Courts to supply to administrative agencies powers denied to them by Congress, which created such agencies.

There were essentially two parts to the petition to show cause filed by EEOC and docketed as an independent action in the District Court. The first part cited the union for contempt for violating the consent judgment entered on May 29, 1968 in the *Locke* case which enjoined the union from "interfering with the right of the plaintiff and others similarly situated to enjoy equal employment opportunity as secured by Title VII of the Civil Rights Act of 1969, 42 U.S.C. Section 2000e." The second part of the petition asked the Court to "amend" its order of September 30, 1968 in the *Locke* case, which had approved new Articles XV and XVI of the Collective Bargaining Agreement, articles which the union had renegotiated with the Contractors' Association in compliance with the judgment entered on May 29, 1968. The petition asked the Court to substitute a new order requiring the union "to take certain specific steps to comply with Title VII."

Only the first part of the petition, citing the union for contempt, related to enforcement of the Court's order. The second part was an attack on the Court's order of September 30, 1968 approving the two renegotiated clauses in the Collective Bargaining Agreement. An attack on the Court's order of September 30, 1968, eight months after it had been entered and while the parties had been operating under it, could hardly be construed as a proceeding to enforce compliance with an order. It was in reality a new action to compel compliance, not with an order of the Court, but with the Civil Rights Act, in which EEOC attempted to exercise powers granted only to the Attorney General.

Insofar as the contempt citation was concerned, EEOC apparently abandoned it. The District Court did

not even consider it. No reference to the contempt charge is made in the Court's opinion.

There was a good reason for abandonment of the contempt charge in the District Court, namely because it was groundless. The union was cited for violation of an injunction restraining it from interfering with the right of the plaintiff and others similarly situated to enjoy equal employment opportunity as secured by Title VII of the Civil Rights Act of 1964.

That no one can be held in contempt of court for violating the provisions of a statute, was held by the Supreme Court in *New York, N. H. & H. R.R.* v. *ICC*, 200 U.S. 361, 404 (1906). Furthermore, the injunction lacked specificity and therefore did not comply with Rule 65(d) of the Federal Rules of Civil Procedure. The injunction was therefore void.

The order of September 30, 1968 was a final order from which no appeal was taken. It approved the two renegotiated clauses of the Collective Bargaining Agreement as being in apparent compliance with the Civil Rights Act of 1964. The statement therein that the clauses were in apparent compliance with the Act did not negate the face that the clauses were nevertheless approved by the Court. The union and the Manufacturers' Association have been operating under them ever since September 30, 1968. EEOC apparently did not discover that the clauses did not comply with the Act until about eight months later. Instead of reporting the matter to the Attorney General for appropriate atcion, it undertook to take action itself.

The union had complied with the order of May 29, 1968 by negotiating a new collective bargaining agreement. That agreement was approved by the order of September 30, 1968. The reservation of jurisdiction by

the Court in the order of May 29, 1968, was only for the purpose of *enforcing* that order. It did not need enforcement because the union complied with it by entering into the new agreement.

The majority treats the petition of EEOC for an order to show cause as a compliance proceeding in the *Locke* case. The trouble with this treatment is that EEOC in said petition sought, not to enforce, but to amend and modify the order entered in the *Locke* case which approved the renegotiated agreement, and to substitute in the place thereof a new order. If such petition is treated as having been filed in the *Locke* case, which it was not, then such filing would at least constitute an intervention in that case. In my opinion EEOC had neither the authority to file an independent action to enforce compliance with the Act, nor authority to intervene in the *Locke* case. The power to file an independent action to enforce compliance with the Act or to intervene in an action instituted by an aggrieved party was vested by Congress solely in the Attorney General. 42 U.S.C. § 2000e-6(a); 42 U.S.C. § 2000e-4(f).

EEOC claimed that the renegotiated collective bargaining agreement approved by the Court, "although nondiscriminatory on its face," and perfectly legal if there had been no past discrimination, did not go far enough to eradicate the effects of the past discriminatory practices. It was not contended, however, that the District Judge, in approving the agreement, acted without knowledge of material facts, or that he made a mistake, or that the parties imposed on him.

In its summary judgment the Court abolished the long-standing seniority and hiring hall provisions of the collective bargaining agreement. These abolished provisions provided for training of apprentice plumbers for

five years, and for a test before an apprentice could become a journeyman plumber. The summary judgment required only one year's experience and a license from the City of Columbus to become a journeyman. This operated to discriminate against the many union members who had been required over the years to obtain five years' apprentice experience and to pass a test before becoming journeymen.

It would seem that if there had been previous discrimination in the admittance of Negroes to the union, in the administration of the apprenticeship program, testing, or *in the hiring* hall procedures, all of which was denied, appropriate orders could have been addressed to these discriminatory practices without entirely abolishing the system and discriminating against other members of the union who have complied with the program. There was substantial evidence that such training and testing was necessary to obtain qualified plumbers, particularly in the field of commercial or industrial buildings. In my opinion the order abolishing the seniority provisions, apprenticeship, testing and hiring hall procedures was punitive in nature rather than remedial. It ought not to have been entered.

I would remand with instructions to dismiss the petition filed by EEOC and leave the redress of any alleged wrong to appropriate action by the Attorney General.

APPENDIX B
ORDER OF SIXTH CIRCUIT COURT OF APPEALS DENYING UNION MOTION FOR REHEARING AND SUGGESTION OF HEARING IN BANC

No. 20,514

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner-Appellee,

vs.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNION NO. 189,

Respondent-Appellant,

and

MECHANICAL CONTRACTORS ASSOCIATION OF CENTRAL OHIO, INC.,

Respondent-Appellee.

ORDER

Before: PHILLIPS, Chief Judge, WEICK and EDWARDS, Circuit Judges.

On consideration of appellant's motion for rehearing and suggestion of rehearing in banc (no member of this court having moved for rehearing in banc), said motion for rehearing is hereby denied.

The court notes that the next to the last paragraph of the opinion should not be read as excluding appropriate use of the disputed statements for purposes of cross-examination and impeachment.

Entered by order of the Court
Carl D. Reuss,
Clerk

FILED: March 30, 1971

APPENDIX C
ORDER OF SIXTH CIRCUIT COURT OF APPEALS DENYING EEOC MOTION FOR CLARIFICATION OF OPINION, AND ALTERNATIVE MOTION FOR REHEARING

No. 20,514

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner-Appellee,

vs.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNION NO. 189,

Respondent-Appellant,

and

MECHANICAL CONTRACTORS ASSOCIATION OF CENTRAL OHIO, INC.,

Respondent-Appellee.

ORDER

Before: PHILLIPS, Chief Judge, WEICK and EDWARDS, Circuit Judges.

On consideration of respondent-appellee's motion for clarification of opinion, the parties' attention is called to the two disputed findings of fact set forth on page 12 of the slip opinion, dated February 12, 1971; and said motion and the alternative motion for rehearing are denied.

Entered by order of the Court
Carl D. Reuss,
Clerk

FILED: March 30, 1971

APPENDIX D
ORDER OF DISTRICT COURT DENYING UNION MOTION TO DISMISS

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION
Civil Action 69-160

EQUAL EMPLOYMENT OPPORUNITY COMMISSION,

Petitioner

vs.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNION NO. 189 and MECHANICAL CONTRACTORS ASSOCIATION OF CENTRAL OHIO, INC.,

Respondents

MEMORANDUM AND ORDER

This proceeding is brought pursuant to Section 706(i) of the Civil Rights Act of 1964 (42 U.S.C.A. § 2000e-5(i)). Petitioner, the Equal Employment Opportunity Commission (herein the Commission) seeks to compel respondents, United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 189 (herein Local 189) and Mechanical Contractors Association of Central Ohio, to comply with an order previously issued by this Court in *Locke* v. *United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 189, et al,* Civil Action No. 68-148, which was

brought pursuant to Section 706(e) of Title VII (42 U.S.C.A. § 2000e-5(e)).

Local 189 moved to dismiss the proceeding pursuant to Rule 12(b) (1) and (6) of the Federal Rules of Civil Procedure. It offers two grounds in support of the motion. First, the Court lacks subject matter jurisdiction over this proceeding because the Commission has not proved that the *Locke* action met all procedural prerequisites for a 706(e) suit, and second, the Commission, itself, cannot seek to enforce the provisions of Title VII or put in issue the terms of respondent's collective bargaining agreement which was rewritten pursuant to this Court's order in the *Locke* case.

The matter has been considered on the motion, the memorandum in support and the oral argument of counsel.

Section 706(i) provides:

> In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under subsection (e), the Commission may commence proceedings to compel compliance with such order.

This provision first appeared in Title VII in the compromise bill that originated in the Senate, after the provisions of the House bill giving the Commission the power to seek enforcement of cease and desist orders were deleted. It is clear that although Congress deprived the Commission of authority to *initiate* proceedings to enforce the provisions of Title VII, it granted the Commission authority to police compliance with orders obtained in private actions and to bring suit to compel compliance with such orders if necessary.[1] See *Local*

1. In explaining the provisions of the new subsection, Senator Dirksen stated:
New subsection (i) provides that the Commission may commence proceedings for contempt where there has been a violation of an order issued by the court in a civil action brought by the aggrieved party. 110 Cong. Rec. 12819.

186, International Pulp, Sulphite and Paper Mill Workers v. *Minnesota Mining and Manufacturing Co.*, —— F. Supp. ——, 60 LC ¶ 9259, p. 6585 (N.D. Ill., 1969); *Rosen* v. *Public Service Electric and Gas Co.*, 409 F.2d 775, 781 (C.A. 3, 1969).

The order of this Court in *Locke* v. *Local 189, et al* granted the plaintiff, and the class of similarly situated persons whom he represented, a permanent injunction which, *inter alia*, enjoined Local 189 from in any way ". . . interfering with the right of plaintiff and others similarly situated to enjoy equal employment opportunity as secured by Title VII . . ." The order further required defendants to renegotiate their Collective Bargaining Agreement "for the sole purpose of assuring compliance with Title VII . . ."

The Commission, which is now seeking to compel compliance with the order, as provided in Section 706(i), may put in issue all matters encompassed by the original order. It may question not only the manner in which Local 189 administers the hiring hall established under defendants' Collective Bargaining Agreement, but also the provisions of the renegotiated agreement itself, to the extent that the agreement operates to deny equal employment opportunity as secured by Title VII.

Local 189's attack on the Court's jurisdiction of the subject matter of this proceeding, based on alleged procedural infirmities in the original civil action, are without merit. Local 189 contends that the Commission has failed to prove that the *Locke* action met the procedural prerequisites for a 706(e) suit, arguing that the *Locke* action was untimely because it was not instituted within sixty days after an administrative charge was filed with the Commission, and because the Commission had not previously found that reasonable cause existed to believe that the charge was true. This view of the

procedural requisites to a 706(e) suit has been consistently rejected by the courts. *Dent* v. *St. Louis-San Francisco Ry Co.*, 406 F.2d 399, 403 (C.A. 5, 1969); *Choate* v. *Caterpillar Tractor Co.*, 402 F.2d 357, 359 (C.A. 7, 1968); *Johnson* v. *Seaboard Air Line RR Co.*, 405 F.2d 645, 648-649 (C.A. 4, 1968); *Miller* v. *International Paper Co.*, 408 F.2d 283, 287 (C.A. 5, 1969); *Cunningham* v. *Litton Industries*, —— F.2d ——, 60 LC ¶ 9275, p. 6643 (C.A. 9, 1969); *Carr v. Conoco Plastics, Inc.*, 295 F.Supp. 1281, 1285 (N.D. Miss., 1969); *Taylor* v. *Armco Steel Corp.*, —— F.Supp ——, 60 LC ¶ 9266, p. 6606 (S.D. Tex., 1969).

Moreover, Local 189, a party to the *Locke* case, conceded the Court's jurisdiction in that case and waived any possible objections thereto when it consented to and signed the May 29, 1968 order of the Court.

For these reasons, the Court holds that:

1. Jurisdiction over the subject matter of this proceeding is conferred by Section 706(i) of Title VII so that this section gives this petitioner authority to test the adequacy of respondents' compliance, and further, to seek compliance with all parts of the Court's order in the *Locke* case.

2. The language of the statute and its legislative history indicate that after a private party (Locke) has obtained a court order under Section 706(e), federal authority may be fully invoked to assure compliance with such order, and in this respect this petitioner was given the responsibility of carrying out the federal policy.

ACCORDINGLY, respondent Local 189's motion to dismiss is DENIED.

Respondents may move or otherwise plead to the peti-

tion within twenty (20) days after service of this order.

Joseph P. Kinneary
United States District Judge

FILED: August 18, 1969

APPENDIX E
ORDER OF DISTRICT COURT GRANTING SUMMARY JUDGMENT IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF OHIO EASTERN DIVISION
Civil Action 69-160

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner

vs:

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNION NO. 189; and MECHANICAL CONTRACTORS ASSOCIATION OF CENTRAL OHIO, INC.,

Respondents

OPINION AND ORDER

This matter is before the Court on the motion of the petitioner, the Equal Employment Opportunity Commission (hereinafter "Commission"), for a summary judgment under the provisions of Rule 56 of the Federal Rules of Civil Procedure. This motion is sought against the respondent, the United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, Local Union No. 189 (hereinafter "Union"), on the issue of whether the Union has violated the provisions of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. § 2000e-2, (herein-

after Title VII) with respect to the hiring hall and referral provisions of their collective bargaining agreement with the other named defendant, the Mechanical Contractors Association of Central Ohio, Inc. (hereinafter "Association").

Rule 56(a) of the Federal Rules of Civil Procedure states that:

> A party seeking to recover upon a claim . . . may . . . move with or without supporting affidavits for a summary judgment in his favor upon all or any part thereof.

And where the pleadings, affidavits and exhibits on file show that there is no genuine issue as to any material fact related to the issue presented by the motion, a summary judgment on that motion, if appropriate, may be rendered forthwith.

The jurisdiction of this Court is invoked pursuant to the provisions of Section 706(i) of Title VII of the Civil Rights Act of 1964. This statute provides:

> In any case in which an employer, employment agency, or labor organization fails to comply with an order of a court issued in a civil action brought under subsection e of this section, the Commission may commence proceedings to compel compliance with such order. 42 U.S.C.A. § 2000e-5(i).

The order which the Commission claims has been violated was issued by this Court on May 29, 1968 in the case of *Locke* v. *Local Union No. 189, et al*, Civil No 68-148 (S.D. E.D. Ohio, 1968). The *Locke* case was a private action under Title VII (42 U.S.C.A. § § 2000e *et seq.*) to redress and enjoin unlawful employment practices, specifically discrimination on the basis of race, on the part of the named defendants.

On May 29, 1968, on the basis of the Settlement Agreement entered into among the parties, the Court ordered in part that:

> 3. Articles XV and XVI of the [Collective Bargaining] Agreement [relating to hiring hall and referral procedures and seniority and lay-off provisions] between Local Union No. 189 and the Mechanical Contractors Association of Central Ohio, Inc., effective June 1, 1967, shall be renegotiated between the parties to the Collective Bargaining Agreement for the sole purpose of assuring compliance with Title VII of the Civil Rights Act of 1964, and submitted to the Court for approval.

Subsequently, on September 30, 1968, a Memorandum of Approval was submitted to the Court, and then signed by this district judge, which stated in part:

> Upon consideration thereof, the Court approves such renegotiated Articles XV and XVI, a copy of which is attached to this Memorandum and made a part hereof, as *appearing* to be in compliance with Title VII of the Civil Rights Act of 1964. [Emphasis added.]

The renegotiated Articles XV and XVI are attached to this Opinion and Order as Appendix A.

The Commission contends in the present proceeding that these renegotiated provisions of the Collective Bargaining Agreement are not, in fact, in compliance with Title VII and that the Union should be required to alter certain provisions of these articles to comply fully with the May 29, 1968 Order in the *Locke* case.

The respondent correctly points out that the remedy of summary judgment is only appropriate when there is no dispute as to material facts related to the issue presented by the motion. It is also true that when there

are inferences sought to be drawn from undisputed facts, they are to be viewed in a light most favorable to the party against whom the summary judgment is sought. *Williamson* v. *Wilbur-Rogers, Inc.*, 381 F.2d 719 (6th Cir. 1967).

The Union has asserted repeatedly that it does dispute some of the facts upon which the Commission must rely in order to set forth a meritorious motion for summary judgment. However, nowhere in the record of this case does it appear that the following facts are genuinely disputed, and the Court finds that they are not, in fact, nor could they reasonably be, disputed.

1. The provisions of the present collective bargaining agreement establish a system of priorities of available work, priority being given to the persons in Group I.[1]
2. The Union's present referral list contains about 1100 names.
3. There are 800 journeymen in Group I, all of whom are white.
4. There is not one Negro journeymen working within the Union's jurisdiction eligible for placement in Group I.
5. There are no Negro journeymen who will become eligible for assignment to Group I in the foreseeable future.
6. There are no Negroes [with the possible exception of Frank Williams] assigned to Group II to which about 300 white journeymen are assigned.
7. Prior to September, 1968, the Union had never referred a Negro.
8. The Union only recently admitted its first Negro apprentices.

1. The relevant provisions of the collective bargaining agreement are contained in Appendix A, attached hereto.

9. The Union has never had a Negro member [with the possible exception of Frank Williams].
10. There are at least nine Negroes within the jurisdiction of the Union who possess City of Columbus plumbing licenses.
11. There are presently and there have been Negroes within the Union's jurisdiction who can perform plumber's work.
12. There are presently Negroes in the Union's jurisdiction who are capable of safely and efficiently performing journeyman work, but who do not meet the requirements set forth in the collective bargaining agreement for placement in Groups I or II.
13. The 1960 Census of Population of the three counties (Franklin, Delaware and Pickaway) which comprise the metropolitan Columbus, Ohio area showed a total population of 754,885 persons. Of this total, the Census listed 81,917 as being members of the Negro race.

With these facts before the Court as undisputed, the essential question presented for judicial determination at this time is whether or not these facts are sufficient to support a summary judgment in the petitioner's favor. Stated otherwise, do the undisputed facts justify a finding by this Court that the hiring hall and referral provisions of the collective bargaining agreement operate in a discriminatory manner and thus are in violation of Title VII of the Act?

Diligent research by this Court has failed to disclose any precedent on the provisions of Section 706(i) of Title VII, the section which serves as the jurisdictional basis of this lawsuit. However, there are several cases decided under Section 707 of the Act (known as "pattern and practice" suits) which have been initiated by the Attorney General and which provide this Court

with precedent on matters involving the interpretation of Title VII.

The Union is adamant in its assertion that it has never engaged in discriminatory practices as they are circumscribed by Title VII and that because this fact is central to the dispute between the parties, summary judgment cannot be granted on the Commission's motion. To this the Court responds that the Union has misinterpreted the thrust of the Commission's motion. The matter of whether or not the hiring hall and referral provisions of the collective bargaining agreement are violative of Title VII is presently a matter for judicial determination. A mere denial of the ultimate fact, namely discriminatory practices, does not automatically preclude the Court from consideration of the merits of the present motion, anymore than a denial of negligence in a personal injury suit would bar summary judgment where the undisputed facts proved otherwise. This Court must decide whether, in light of federal statutory law, the precedents of the federal courts interpreting such law, and the undisputed facts established by the Commission, the provisions of the agreement are in violation of Title VII.

It may be true that in some cases statistics do not lie, but the present interest of this Court is directed to whether the statistics tell the whole truth.

> In the problem of racial discrimination, statistics often tell much, and Courts listen. *State of Alabama* v. *United States*, 304 F.2d 583, 586 (5th Cir. 1962), *aff'd* 371 U.S. 37 (1962).

Even under the relatively recent provisions of Title VII, there have been a number of cases which have considered the role of statistics in relation to claims of racial discrimination.

In *Lea* v. *Cone Mills Corporation,* 301 F.Supp. 97 (M. D. N.C. 1969) the Court recited as relevant findings of fact that:

> 4. As of July 2, 1965, 346 persons were employed in the Eno Plant. Of these, approximately 310 were white employees and 36 were Negro male employees. No Negro females were employed in any capacity at the Eno Plant.
>
> . . .
>
> 15. This action was instituted on September 15, 1966, and by November 1, 1966, there were five Negro females employed at the Eno Plant.
>
> . . .
>
> 27. Plaintiffs Lea and Pinnix were interviewed by the personnel manager at the same time. Both testified that the personnel manager told them that Eno Plant did not employ Negro females. The personnel manager did not remember the question being asked, but testified that it was a fact that no Negro females had ever been employed at the plant. From the conflicting evidence, it is found that, for all practical purposes, Negro females were not considered for employment at the Eno Plant, at least prior to July 2, 1965. *Lea, supra,* 301 F. Supp. at 97-100.

The Court went on to say at page 102 that:

> While the defendant's Personnel Policy Manual, effective since April 1, 1963, directs the selection of applicants for employment without regard to race, statistics, which often tell more than words, effectively refute the claim that the policy was practiced with respect to Negro females. *State of Alabama* v. *United States,* 5 Cir., 304 F.2d 583 (1962). The fact that no Negro females had applied for employment before the spring of 1965 does not, contrary to the argument of defendant, show either lack of interest or disprove discrimination. The more plausible explanation of this inaction is that,

because of defendant's hiring practices over a long period of years, Negro females felt their efforts to obtain employment would be futile. *Cypress* v. *Newport News General & Nonsectarian Hosp. Ass'n.*, 4 Cir., 375 F.2d 648 (1967). Moreover, defendant's hiring procedures of granting initial hiring preference to former employees and close friends and relatives of its existing work force is inherently discriminatory against Negro females. *Dobbins* v. *Local 212, International Bro. of Elect. Wkrs.*, 292 F.Supp. 413 (S.D. Ohio, 1968). Even though seven Negro females have been employed, the hiring prefences of defendant will continue to place Negro female applicants at a competitive disadvantage when seeking employment, thus constituting a prima facie inference of discrimination. *Lea, supra*, 301 F.Supp. at 102.

In *United States* v. *Sheet Metal Workers International Association, Local Union No. 36*, 280 F.Supp. 719 (E.D. Mo. 1968), a "pattern and practice" suit brought by the Attorney General pursuant to Title VII, 42 U.S.C.A. §2000e-2(c), the trial court relied heavily on statistics to find the existence of pre-Act racial discrimination. *See, Sheet Metal Workers, supra*, 280 F.Supp. at 721.

The Union asserts that the use of statistical data regarding Negro population in a given area as compared to Negro representation in a defined group, such as a craft union, is inappropriate because, as the court said in *Dobbins* v. *Local 212, International Brotherhood of Electrical Workers*, 292 F. Supp. 413 (S.D. Ohio 1968):

> In some fields a prima facie case of pattern and practice is made out on a showing that given privileges are exercised only, or for the greater extent, by W's [Whites] and that there is in the area a substantial N [Negro] population and that there have been repeated attempts by N's to exercise such rights. Such is certainly true in the education and

> voting fields. However, we deal here with a "craft" union.[15] It is one thing to presume or assume, prima facie or otherwise, that a significant number of a group have the qualifications for schooling, or voting, or jury service. It is another thing to assume, prima facie or otherwise, that because a certain number of people exist, be they W or N, that any significant number of them are lawyers or doctors, or merchants, or chiefs — or to be concrete, are competent plumbers or electricians or carpenters. While the electricians may only date back to Benjamin Franklin, they are part and parcel of building trades and from time immemorial the word "craft" is necessarily entwined with skill. That is true even in the dictionary.
>
> . . .

The assumption that the Court found objectionable in the *Dobbins* case does not have to be made in the instant case. The Union agrees that there are approximately nine (9) Negroes in the City of Columbus who possess city plumbing licenses. The contention has not been made, nor could it reasonably be made, that the obtaining of a city plumbing license does not bear some relationship to the ability of that person to perform the "craft" of plumbing. In fact, the Union seems to *require* that a person obtain one before admission to its membership, presumably because it *does* bear a direct relationship to the individual's qualifications to engage in the occupation of plumbing. In the affidavit of Charles Gronback, a member of the Examining Board of Local 189, it is stated:

> As the facts stated herein show, the written examination [the journeyman examination given by the Board] is designed to and does test only for very minimal and necessary knowledge of legal and prac-

15. There is no such thing as an "Instant Electrician" — by court decree or otherwise. *Dobbins, supra*, 292 F. Supp. at 445.

> tical requirements in the trade. *Any person passing the City of Columbus license examination can pass the journeyman written examination.* [Emphasis added.] Gronback Affidavit, ¶9.

It is thus perfectly clear to this Court that the possession of a City of Columbus plumbing license does indeed indicate that the licensee has acquired sufficient skill in the craft of plumbing to qualify as a journeyman even under the Union's standards. This being true, it is an undisputable fact that there are at least nine (9) Negro plumbers in the City of Columbus who possess skills commensurate with white Union journeymen presently in Seniority Groups I and II under the Union's Collective Bargaining Agreement.

In *United States* v. *Sheet Metal Workers International Association, Local Union No. 36, et al,* 416 F.2d 123 (8th Cir. 1969) the Court cited with approval the proposition that:

> Obviously, when a large company [labor organization] in an area with a diverse population is found to have no Negro employees [members], even though it hires new men regularly [accepts new men regularly] and has standard job requirements [standard membership requirements], the inference of discrimination is reasonable. *Local Union No.36, supra,* 416 F.2d at 127 fn. 7 [citing 32 U. of Chi. L. Rev. at 461].

There are other cases which additionally support the use of statistics in finding racial discrimination. See, *United States* v. *Plumbing and Pipefitting Industry, Local 73,* —— F. Supp. ——, 61 LC ¶ 9329, p. 6864 (S.D. Ind. 1969) and *United States* v. *Hayes International Corp.,* 415 F.2d 1038 (5th Cir. 1969).

There are two additional factors worthy of note at this time. First, the Court considers it not a mere co-

incidence that only after the initiation of the present litigation (including the private action under Title VII, *Locke v. Local Union No. 189, et al,* Civil No. 68-148 (S.D. E.D. Ohio 1968)) did the Union see fit to place Negroes on the referral list. And, in spite of the fact that Negroes were only placed in the least desirable seniority group, Group III, at least fifteen (15) Negro plumbers were placed on the referral list in the short period between January, 1969 to June, 1969. It seems most fanciful to suggest that suddenly fifteen (15) Negro plumbers, who never before sought or desired to seek placement on the Union's referral list, appeared by chance just subsequent to these Title VII proceedings against the Union. The true fact is that Negro plumbers were always present, but now they thought they had at least a hopeful chance at equal referral rights.

The Union has argued at various times that the proof adduced in prior Title VII cases has been much more probative and convincing than that asserted here, and that this difference in degree is significant enough to require this Court to deny the relief that the Commission seeks. The judicial decisions relied upon by the Union for this proposition are in the main "pattern and practice" suits brought by the Attorney General. The Commission in the instant case is not burdened with establishing a "pattern and practice" of discrimination, but rather must only show the illegality under Title VII standards of the provisions of the Collective Bargaining Agreement. This burden the Commission has carried.

The Union repeatedly points out that even if there are skilled Negro plumbers within their jurisdiction, there is a singular lack of interest on the part of these Negro plumbers to join the Union. However, such apathy is not surprising when considered in light of the

fact that Negroes would at best be placed in Seniority Group II, thus immediately placing at least 800 white journeymen in a more favorable position vis-a-vis the equally skilled Negro and creating a substantial possibility of long periods of unemployment because Group II plumbers would be the first ones laid off. The acceptance of lower paying non-union work on the part of the Negro plumbers is also explainable by the fact that the Negro community knew that the Union was off limits to members of their race. Deposition of Louis Toone at pp. 26-28; Deposition of Robert N. Milnar at pp. 52-54. *See, Lea v. Cone Mills Corporation, supra,* 301 F.Supp. at 102; *United States* v. *Sheet Metal Workers International Association, Local Union No. 36, et al, supra,* 416 F.2d at 132; and *United States* v. *Plumbing and Pipefitting Industry, Local 73, supra.* The Court determines that the alleged lack of active interest on the part of Negro plumbers in joining the Union, or even in using the Union's hiring hall, is not due to the absence of any skilled Negro plumbers in the area, nor does it tend to show lack of discriminatory practices on the part of the Union. The Union's reputation in the Negro community belies the contention that it had an "open door" policy but that only whites choose to walk through.

The Court determines that the *inescapable* conclusion to be drawn from the undisputed and undisputable facts that appear on this record is that the present seniority and layoff provisions of the Collective Bargaining Agreement (see Appendix A) have the effect of perpetuating past discriminatory practices. This conclusion is reached on the basis of the requirement of Seniority Group I that plumbers must have been employed for at least 1200 hours a year in each of any five consecutive years under a Collective Bargaining Agreement between the

parties to this Agreement. Heretofore Negroes have been effectively precluded from any possibility of fulfilling this requirement and thus have been denied equal employment opportunity because of their race.

Further bases for this conclusion are the journeyman examination requirement of Groups I and II which, in light of the requirement for a City of Columbus plumbing license, bears no reasonable relation to the ability of the individual to perform the craft of plumbing and the five years of experience required for Group II placement which, in light of a similar provision for only one year of experience if acquired through the apprentice program can only operate to exclude non-apprentices (heretofore Negroes) from securing referral on an equal basis for equal skill.

WHEREUPON, the Court determines that the motion of the petitioner for summary judgment is MERITORIOUS and therefore it is GRANTED.

Relief

The nature of the relief to be granted in a case such as presented here is difficult to formulate. As the Fifth Circuit has stated:

> In this case we deal with one of the most perplexing issues troubling the courts under Title VII . . . : how to reconcile equal employment opportunity *today* with seniority expectations based on yesterday's built-in racial discrimination. May an employer continue to award formerly "white jobs" on the basis of seniority attained in other formerly white jobs, or must the employer consider the employee's experience in formerly "Negro jobs" as an equivalent measure of seniority? *Local 189, United Papermakers and Paperworkers, et al* v. *United States*, 416 F.2d 980, 982-3 (5th Cir. 1969).

Translated into the context of the present situation, can the Union in its Collective Bargaining Agreement require as a criterion for inclusion in the top seniority group experience under prior Collective Bargaining Agreements, which experience has been effectively denied the Negroes of this community?

The Commission, in its motion for summary judgment seeks the following remedy:

1. The immediate placement of all Negroes in Group III into Group I.
2. A proper method of communicating the Union's policy of non-discrimination to the Negro community, inviting Negro craftsmen to seek placement on the referral list, and the placement on the list in Group I of all persons who have a year or more experience in the trade.
3. The establishment of a period of two or more years during which Negro craftsmen will be entitled to apply for placement on the referral list.
4. Establish opportunities for granting to Negroes outside the normal age for apprentices, opportunities to learn the trade.
5. Forbid the imposition of a testing requirement as to all persons who have a year of experience.

The range of remedies afforded in other Title VII cases has been wide. See, *Local 189, supra,* 416 F.2d at 985, *Quarles* v. *Philip Morris, Incorporated,* 279 F.Supp. 505, 520-1 (E.D. Va. 1968); and *Dobbins* v. *Local 212, International Brotherhood of Electrical Workers,* 292 F.Supp. 413, 450-3 (S.D. Ohio, 1968).

With respect to seniority provisions, Title VII of the Civil Rights Act of 1964 states:

> (b) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employ-

> . . ment practice for an employee to apply different standards of compensation, or different terms, conditions or privileges of employment pursuant to bona fide seniority or merit system . . . provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin . . . 42 U.S.C.A. § 2000e-2(h).

In *Quarles*, the Court stated:

> The court holds that a departmental seniority system that has its genesis in racial discrimination is not a *bona fide* seniority system.
>
> Section 703(h) [42 U.S.C.A. §2000e-2(h)] also contains a proviso that touches upon the issue. It declares that it shall not be an unlawful employmen practice for an employer to apply different standards pursuant to a *bona fide* seniority system " . . . provided that such differences are not the result of an intention to discriminate because of race . . . " The differences between the terms and conditions of employment for white and Negroes about which plaintiffs complain are the result of an intention to discriminate in hiring policies on the basis of race before January 1, 1966. The differences that originated before the act are maintained now. The act does not condone present differences that are the result of an intention to discriminate before the effective date of the act, although such a provision could have been included in the act had Congress so intended. The court holds that the present differences in departmental seniority that result from the company's intentional, racially discriminatory hiring policy before January 1, 1966, are not validated by the *proviso* of §703(h). *Quarles, supra*, 279 F.Supp. at 517-8.

The seniority system in the present case is not *bona fide* because the present structure perpetuates past discriminatory practice.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. The Union and the Association shall enter into a renegotiated Collective Bargaining Agreement which will provide, inter alia, for:
   (a) The elimination of the five year experience requirement now in effect for Seniority Groups I and II.
   (b) The elimination of the journeyman's examination as given by the Union as a requisite for Seniority Groups I and II. The possession of a city plumbing license will make a person, otherwise eligible, a member of the highest seniority group.
   (c) The elimination of the requirement of Union membership for placement and/or referral in the highest seniority group.
   (d) The placement of all Negroes who possess city licenses and who are presently enrolled in any seniority group in the highest seniority group.
   (e) One year's experience in the trade and possession of a city plumbing license to make any person eligible for referral on the same basis as any other plumber regardless of Union membership.
   (f) An apprenticeship program which will establish opportunities for Negroes, outside the normal age for apprentices, to learn the trade. The provisions of the apprenticeship program shall have no effect on the enrollee's eligibility for inclusion on the referral list.
2. The Union and the Association shall submit such renegotiated agreement to the Court within forty-five (45) days of the date of this Order.
3. This Court shall retain jurisdiction of this action for such further relief or modification of this Order as may be required.

JOSEPH D. KINNEARY,
United States District Judge.

APPENDIX A
ARTICLE XV. REFERRAL AND HIRING HALL PROCEDURE

In the interest of maintaining an efficient system of production in the industry, providing for an orderly procedure of referral of applicants for employment, preserving the legitimate interests of the employees in their employment status within the area and to insure that there shall be no discrimination in employment because of membership or non-membership in the Union, the parties hereto agree to the following system of referral of applicants for employment;

(1) The Union shall be the sole and exclusive source of referrals of applicants for employment.

(2) The Union shall select and refer applicants for employment without regard to race, creed, color or national origin and without discrimination against such applicants by reason of membership or non-membership in the Union and such selection and referral shall not be affected in any way by rules, regulations, by-laws, constitutional provisions or any other policies or requirements. All such selection and referral shall be in accordance with the following procedure:

(3) The Union shall maintain a register of applicants for employment established on the basis of Seniority Groups listed below. Each applicant for employment shall be registered in the highest priority Group for which he qualifies.

SENIORITY GROUP I—All applicants for employment who have five (5) or more years' experience in the plumbing and pipe fitting trade, are residents of the geographical area constituting the normal construction labor market, have passed a journeyman's examination given by a duly constituted local union of the United Association and who have been employed for at least 1200 hours a year

in each of any five consecutive years under a Collective Bargaining Agreement between the parties to this Agreement. Apprentices who have completed their probationary training period in accordance with the rules of the Plumbers and Pipe Fitters Apprenticeship Program, as established by the parties hereto, shall be registered and placed in Seniority Group I.

SENIORITY GROUP II. All applicants for employment who have five (5) or more years' experience in the plumbing and pipe fitting trade and who have passed a journeyman's examination given by a duly constituted local union of the United Association.

SENIORITY GROUP III. All applicants for employment who have worked at the plumbing and pipe fitting trade for more than one (1) year.

"Normal construction labor market" is defined to mean the following geographical area: all of Delaware County, Fairfield County, Franklin County, Hocking County, Marion County, Pickaway County, Union County, and Madison County, east of Route #38, not including the City of London, or any other jurisdiction awarded to the Union.

For the purpose of this Article XV, "resident" means a person who has maintained a permanent home in the above defined geographical area for a period of not less than one year, or who, having had a permanent home in this area, has temporarily left with the intention of returning to this area for a permanent home.

Reasonable intervals of time for journeyman's examinations shall be no less than six (6) months after a qualified applicant requests such examination, provided the applicant has five (5) years' experience in the plumbing and pipe fitting trade. Failure to pass the examination shall exclude the applicant from retaking the

examination for a period of one year, except that the Appeals Committee may rule otherwise.

(4) The Union shall maintain an "Out of Work List" which shall list the applicants within each Seniority Group in chronological order of the dates they qualify for employment. Each applicant must be available for employment within twenty-four (24) hours after notice is given by the Union. Applicants for referral must renew their applications at least every thirty (30) days in order to maintain their place on the Out of Work List. Any applicant who is referred to an Employer for a stated job of five (5) days or less duration shall be returned to his appropriate place within his Seniority Group and shall be referred to other employment in accordance with the position of his Group and his place within the Group. The Business Manager shall give each applicant for employment, who is referred to an Employer, a referral slip showing his name, address, date of referral and such other information, as may be deemed necessary. If the applicant is not hired by the Employer, the Employer shall sign the slip and return it to the applicant, who shall in turn, give it to the Union when he returns to the Union Office. If the applicant is hired by the Employer, the Employer shall, within twenty-four (24) hours, mail the referral slip back to the Union showing the date the applicant started to work. Each Employer shall promptly notify the Union when any employee is terminated. No applicant for employment shall be placed on the Out of Work List until termination notice is received from the last Employer.

(5) Employers shall advise the Business Manager of the Local Union of the number of applicants needed. The Business Manager shall refer applicants to the Employer by first referring applicants in Seniority Group I in the order of their places on the Out of Work List and then referring applicants

in the same manner, successively, from the Out of Work List in Seniority Group II and then Seniority Group III. Any applicant who is rejected by the Employer shall be returned to his appropriate place within his Seniority Group and shall be referred to other employment in accordance with the position of his Seniority Group and his place within the Seniority Group. The only exceptions which shall be allowed in this order of referral are as follows:

(a) When an Employer states bona fide requirements for special skills and abilities in his request for applicants, the Business Manager shall refer the first applicant on the register possessing such skills and abilities.

(b) When an Employer requests particular plumbers or pipefitters previously employed by the Employer who have been laid off or terminated by the Employer ninety (90) days previous to the request.

(c) If the age ratio clause in the Agreement calls for employment of an additional employee or employees on the basis of age, the Business Manager shall refer the first applicant on the register satisfying the applicable age requirements.

(d) When an employee who has satisfied the standards established by this referral plan becomes an officer in the Union and is required to spend full time in that office for a specified period, each employee will retain and accumulate his employment qualifications under this Agreement.

(6) An "Appeals Committee" is hereby established composed of three members of the Labor Management Committee representing the employer and appointed by the Mechanical Contractors Association of Central Ohio, Inc., three members of the Labor Management Committee representing the the employees and appointed by the Union and one

public member selected by the aforementioned six members. In the event that the six members cannot agree on the selection of the public member, they shall petition the United States District Court for the Southern District of Ohio, Eastern Division, for the appointment of such public member. It shall be the function of the Appeals Committee to consider any complaint of any employee or applicant for employment arising out of the procedures set forth in this Article XV. The Appeals Committee shall have the power to make a final and binding decision of the above matters. The Appeals Committee is authorized to issue procedural rules for the conduct of its business, but it is not authorized to add to, subtract from, or modify any of the procedures of this Article XV and its decision shall be in accordance with this Article XV.

(7) A copy of the referral procedure set forth in this Agreement shall be posted on the bulletin board of the offices of the Union and in the offices of the Employers who are parties to this Agreement.

(8) Every shop employing six (6) or more journeymen, for every six (6) journeymen, one (1) shall be fifty-five (55) years of age or over, if available.

ARTICLE XVI. SENIORITY AND LAY-OFF

(1) This article shall apply to those employees registered and placed in the Seniority Groups set out and described in Article XV.

(2) For the purposes of lay-off, there is to be no seniority within a Seniority Group and seniority for employees shall be confined to designated Seniority Groups, i.e.;

i. Employees registered and placed in Seniority Group I shall have seniority over employees registered and placed in Seniority Group II.

ii. Employees registered and placed in Seniority Group II shall have seniority over employees registered and placed in Seniority Group III.

(3) In the event that an Employer finds it necessary to lay off employees such lay-offs shall be made in accordance with the following procedure:

i. Employees in Seniority Group III shall be laid off before employees in Seniority Groups I and II, inclusive, are laid off.

ii. Employees in Seniority Group II shall be laid off before employees in Seniority Group I are laid off.

APPENDIX F
ORDER OF DISTRICT COURT IN LOCKE CASE, DATED MAY 29, 1968

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION
Civil Action No. 68-148

GWYLARD W. LOCKE,

Plaintiff,

vs.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNION NO. 189, ET AL.,

Defendants.

ORDER

At Columbus, Ohio, on this 29th day of May, 1968.

This day this cause came on for hearing, and on the basis of the Settlement Agreement entered into between the parties and previously filed with this Court, the Court hereby ORDERS:

1. Plaintiff, and the class whom he represents, is hereby granted a permanent injunction enjoining defendant, Local Union No. 189, its agents, successors, trustees, officers, employees, attorneys, and those acting in concert with them and at their direction or request from continuing or maintaining any policy, practice, custom or usage, including strikes, work stoppages or work slowdowns, of denying, abridging, withholding, conditioning, directing, or otherwise interfering with the right of plaintiff and others similarly situated to

enjoy equal employment opportunity as secured by Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e.

2. Local Union No. 189, through its agents, shall take affirmative action forthwith, to assure Gwylard W. Locke equal employment opportunity.

3. Articles XV and XVI of the Agreement between Local Union No. 189 and the Mechanical Contractors Association of Central Ohio, Inc., effective June 1, 1967, shall be re-negotiated between the parties to the Collective Bargaining Agreement for the sole purpose of assuring compliance with Title VII of the Civil Rights Act of 1964, and submitted to the Court for approval.

4. Plaintiff Gwylard W. Locke is awarded the sum of $10,000 damages from the defendant Local Union No. 189.

5. Defendants Dannie Lewis, Gene Evans, Charles Moore and Vince McCarthy, in their individual capacity, are dismissed as parties defendant.

The Court shall retain continuing jurisdiction to enforce this Order.

/s/ JOSEPH P. KINNEARY,
United States District Judge.

APPROVED:
JOHN W. PALMER, *Attorney for Plaintiff,*
and the class whom he represents.
JOSEPH M. MILLIOUS, *Attorney for Defendant,*
Mechanical Contractors Association of
Central, Ohio, Inc.
N. VICTOR GOODMAN, *Attorney for Defendant,*
Local Union No. 189.
DAVID CLAYMAN, *Attorney for Defendants,*
Gene Evans, Charles Moore and Vince McCarthy.
FILED: May 29, 1968.

APPENDIX G

ORDER OF DISTRICT COURT IN LOCKE CASE, DATED SEPTEMBER 30, 1968

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION
Civil Action 68-148

GWYLARD W. LOCKE,

Plaintiff,

vs.

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNION NO. 189, ET AL,

Defendants.

MEMORANDUM OF APPROVAL

This matter is before the Court relative to its order of May 29, 1968, wherein, in paragraph 3 thereof it is provided that the defendants, Local Union No. 189 and the Mechanical Contractors Association of Central Ohio, parties to a collective bargaining agreement, shall renegotiate Articles XV and XVI of such agreement for the sole purpose of assuring compliance with Title XII of the Civil Rights Act of 1964, and submit such renegotiated articles to this Court for approval.

The Court has considered this matter on (1) the "Settlement Agreement to Form Bases of Court Order," as filed in this action on May 29, 1968, (2) the Order of this Court made on the basis of the Settlement Agreement entered into among all the parties in this action

and filed on May 29, 1960, (3) the renegotiated said Articles XV and XVI of the collective bargaining agreement between the Union and the Contractors Association proposed as being in compliance with Title III of the Civil Rights Act of 1964, and (4) a hearing in chambers on the proposed revised Articles XV and XVI with all parties represented.

Upon consideration thereof, the Court approves such renegotiated Articles XV and XVI a copy of which is attached to this Memorandum and made a part hereof, as appearing to be in compliance with Title XII of the Civil Rights Act of 1964.

/s/ JOSEPH P. KINNEARY,
United States District Judge.

FILED: September 30, 1968.

APPENDIX H

ADDITIONAL STATUTES INVOLVED

In addition to Section 706 (i) of Title VII of the Civil Rights Act of 1964, quoted in full in Statutes Involved, *infra* p. 3, the following provisions of Title VII are set forth for the Court's consideration.

Section 705 (f) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-4(f)(6):

> "(f) The Commission shall have power—
>
> (6) to refer matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party under section 2000e-5 of this title, or for the institution of a civil action by the Attorney General under section 2000e-6 of this title, and to advise, consult, and assist the Attorney General on such matters."

Section 706 (e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-5 (e):

> "(e) If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) of this section (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this subchapter, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the

court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) of this section or the efforts of the Commission to obtain voluntary compliance.

Section 707 (a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e-6 (a):

"(a) Whenever the Attorney General has reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights secured by this subchapter, and that the pattern or practice is of such a nature and is intended to deny the full exercise of the rights herein described, the Attorney General may bring a civil action in the appropriate district court of the United States by filing with it a complaint (1) signed by him (or in his absence the Acting Attorney General), (2) setting forth facts pertaining to such pattern or practice, and (3) requesting such relief, including an application for a permanent or temporary injunction, restraining order or other order against the person or persons responsible for such pattern or practice, as he deems necessary to insure the full enjoyment of the rights herein described."

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 70-333

UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPEFITTING INDUSTRY OF THE UNITED STATES AND CANADA, LOCAL UNION NO. 189, PETITIONER

v.

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 438 F.2d 408. The opinion of the district court (Pet. App. E) is reported at 311 F. Supp. 468.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 1971. The Union's petition for rehearing and suggestion for rehearing *en banc* was denied on March 30, 1971. EEOC's motion for clarification of opinion and alternative motion for rehearing were also denied on March 30, 1971. The petition for a writ

441-397—71

of certiorari was filed on June 25, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether Section 706(i) of the Civil Rights Act of 1964, 42 U.S.C. 2000e–5(i), gives EEOC the authority to seek to compel compliance with an earlier order issued by a federal district court in an action brought by a private individual to enjoin employment discrimination, by seeking a supplementary order requiring defendants to take further action to comply with the court's earlier order, where the court had tentatively found defendants to be in compliance with that order.

STATUTE INVOLVED

The relevant provisions of Title VII of the Civil Rights Act of 1964 are set forth at page 3 of the petition.

STATEMENT

On May 18, 1968, Gwylard Locke filed a class action, pursuant to Section 706(e) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e–5(e), against the petitioner union and respondent Mechanical Contractors Association of Central Ohio, Inc. (hereinafter the Contractors), alleging that the job referral procedures established under the collective bargaining agreement between the Union and the Contractors denied equal employment opportunity to blacks. On May 29, 1968, the district court accepted a settlement agreement and issued an order requiring, *inter alia,* that petitioner and the Contractors renegotiate their collective bargaining agreement "for the sole purpose of assuring compliance with Title VII * * *" and

that they submit the renegotiated agreement to the court for approval (Pet. App. 63). The court retained jurisdiction to enforce its order (*ibid.*). After renegotiation, the collective bargaining agreement was approved by the court on September 30, 1968, "as appearing to be in compliance with title VII of the Civil Rights Act of 1964" (Pet. App. 65).

The present proceedings were initiated by a "Petition to Show Cause and for Other Relief" filed by EEOC pursuant to Section 706(i) of Title VII, 42 U.S.C. 2000e–5(i). EEOC contended that the renegotiated agreement did not meet the requirements of Title VII, and petitioned the court for a supplementary order requiring a further modification of the agreement to bring it into compliance. The court entertained the petition and, after the Union filed an answer, EEOC moved for summary judgment, which the court granted on April 14, 1970. The court found that certain provisions of the renegotiated agreement, as EEOC contended, had the effect of perpetuating past discriminatory practices and were, therefore, illegal under Title VII. Consequently, the court held that the Union and the Contractors had not complied with the court's order of May 29, 1968, requiring renegotiation of the contract to comply with Title VII. The court, therefore, ordered the Union and the Contractors to renegotiate the agreement with specific provisions eliminating certain test, experience, and age requirements. (Pet. App. 54–55.) The Union appealed.

The court of appeals sustained EEOC's authority to bring the action, holding "that this is an appropriate proceeding 'to compel compliance' with the District

Court order in the *Locke* case (42 U.S.C. § 2000e–5(i)) and that the District Court had both jurisdiction and power to enter the supplementary order here appealed from" (Pet. App. 26). However, the court ruled that because there was genuine dispute regarding some of the facts, summary judgment was inappropriate; accordingly, it vacated the judgment and remanded the case for a hearing (Pet. App. 27).

ARGUMENT

Petitioner contends that EEOC, in seeking from the court a supplementary order restructuring the collective bargaining agreement to comply with Title VII, went beyond its authority under 42 U.S.C. 2000e–5(i). That Section, however, gives EEOC, without qualification, power to commence proceedings to compel compliance with previous court orders. Title VII of the Civil Rights Act of 1964 is the product of a legislative compromise which denied the Commission power to initiate lawsuits to enforce the provisions of the Title, and vested such power in private individuals (Section 706(e), 42 U.S.C. 2000e–5(e)) and, in certain circumstances, in the Attorney General (Section 707, 42 U.S.C. 2000e–6).[1] The Commission's primary function under the Title is the investigation of complaints by persons claiming to be aggrieved, and the settlement of cases determined to be meritorious with a view toward obtaining voluntary compliance. Section

[1] The relevant legislative history is sumarized in *Miller* v. *International Paper Co.*, 408 F. 2d 283, 286 (C.A. 5). See also *Pettway* v. *American Cast Iron Pipe Co.*, 411 F. 2d 998, 1005 (C.A. 5).

706(a), 42 U.S.C. 2000e–5(a). The legislative compromise, however, expressly conferred on the Commission in Section 706(i) the power to initiate judicial proceedings to compel compliance with court orders issued in suits commenced pursuant to Section 706(e).

The enforcement power thus vested in the Commission is an essential component of the statutory scheme. Since Title VII actions by definition attack discrimination directed against a particular class of persons (here, a racial class), the relief secured inevitably benefits all members of the class, and not merely the individual plaintiffs. *Jenkins* v. *United Gas Corp.*, 400 F.2d. 28, 32–33 (C.A. 5). A plaintiff, however, having once matched his individual resources against those of an institutional defendant, is often not prepared to assume the additional burden of policing compliance.[2] Furthermore he has little incentive to do so where the interests of the class are affected by a violation of the order he has secured, but his personal interests are protected. Cf. *Jenkins* v. *United Gas Corp., supra,* at 33. Therefore proceedings brought by the Commission under Section 706(i) often provide the only effective means of enforcing class relief previously granted under Title VII—and this is the apparent reason why Congress conferred the enforcement authority on the Commission. Cf. *Hall* v. *Werthan Bag Corp.*, 251 F. Supp. 184, 186–187 (M.D. Tenn).

In the present case, the district court initially

---

[2] Title VII cases have been characterized as an economic "David and Goliath confrontation." *Pettway* v. *American Cast Iron Pipe Co., supra,* at 1005.

ordered renegotiation of the collective bargaining agreement to comply with Title VII, and subsequently gave tentative approval to the renegotiated agreement, while retaining continuing jurisdiction of the cause. EEOC then filed a motion alleging that the newly executed agreement failed to meet the requirements of the statute and urging that it be modified to comply with Title VII, as the court had originally ordered. The proceeding instituted by EEOC was properly regarded, by both the court of appeals and the district court, as an action to compel compliance with the district court's original order. The action brought by the private plaintiff was a class action, requiring the extension of relief beyond the situation of the named complainant (who in this case was apparently made whole by the court's original order), and EEOC properly urged upon the court the need to grant fuller relief for the entire class in order to effectuate the intent of the original order. Indeed, EEOC's action under 42 U.S.C. 2000e–5(i) was especially appropriate here since the district court had given only tentative approval to the agreement and had retained jurisdiction.[3]

Petitioner argues (Pet. 9–10) that, notwithstanding the unqualified language of the statute, Congress

---

[3] Petitioner also argues that EEOC's failure to join the named complainant in the proceeding made the compliance proceeding an independent action unauthorized by 42 U.S.C. 2000e–5(i). Nothing in that Section, however, requires EEOC to exercise its enforcement function through, or in connection with, the original complainant. Rather, all that is required is that there be a pre-existing order which EEOC seeks to effectuate.

intended to authorize the Commission only to bring contempt proceedings. In the absence of clear evidence to the contrary,[4] however, it should be presumed that Congress intended to confer on the Commission the authority to enforce court orders by any means appropriate in the particular circumstances. Cf. *Federal Trade Commission* v. *Dean Foods Co.* 384 U.S. 597, 608. And certainly a remedy less harsh than that of contempt is in keeping with the remedial, non-punitive nature of Title VII. See *Robinson* v. *Lorillard Corp.*, C.A. 4, Nos. 15,098 and 15,099, decided July 1, 1971, slip op. pp. 26–28. Moreover, if the Commission cannot maintain actions to compel compliance other than contempt proceedings, the burden of doing so, which the Union characterizes as heavy (Pet. 12), must rest on private individuals. Surely this would be contrary to the congressional judgment expressed in Section 706 (i) that, having once secured relief, private individuals should not have to expend their resources to police the enforcement of that relief.

Petitioner also contends that failure to construe 42 U.S.C. 2000e–5(i) to limit EEOC to the institution of contempt proceedings will compromise the Attorney General's Title VII enforcement powers. Once again, however, EEOC does not contend that it has

---

[4] Petitioner relies on a short statement by Senator Dirksen (Pet. 10). That statement, however, appears merely to provide an example, rather than to define the scope of the Commission's authority under Section 706(i). See 110 Cong. Rec. 12724 (remarks of Senator Humphrey).

the power to initiate Title VII actions; it recognizes that its enforcement prerogatives must be premised on pre-existing litigation.

Petitioner does not here challenge on its merits the relief granted by the district court. Instead, petitioner contends that under 42 U.S.C. 2000e–5(i) EEOC is not a proper party to seek the relief and, therefore, the court was without jurisdiction to act on the EEOC motion. In our view, EEOC, in instituting the compliance proceedings, acted not only within the authority granted it by the clear language of the Act, but also in accord with the fundamental remedial purpose of Title VII to provide the full measure of relief under the statute to the victims of unlawful discrimination. Cf. *Sanchez* v. *Standard Brands, Inc.*, 431 F.2d 455 (C.A. 5); *Miller* v. *International Paper Co.*, 408 F.2d 283 (C.A. 5); *Choate* v. *Caterpillar Tractor Co.*, 402 F.2d 357 (C.A. 7).[5]

---

[5] Petitioner's contention that there is a conflict between the decision below and the decisions of other circuits is without merit. This case is the first in which EEOC has sought to compel compliance with an order issued in a prior private action. While it is true that the Fifth Circuit, in several cases cited by petitioner (Pet. 11), has remarked in dicta that EEOC is without enforcement powers, none of those cases involved situations in which EEOC was seeking, under Section 706(i), to compel compliance with a court order issued in a private action.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.
DAVID L. NORMAN,
Acting Assistant Attorney General.
DAVID L. ROSE,
EILEEN M. STEIN,
Attorneys.

STANLEY HEBERT,
General Counsel,
JOHN DE J. PEMBERTON, JR.,
Deputy General Counsel,
JULIA P. COOPER,
CHARLES L. REISCHEL,
Attorneys,
Equal Employment Opportunity Commission.

AUGUST 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971